Supreme Court, U.S.
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No. 03-630

In The Supreme Court of the United States

RONALD H. MANNING,

Petitioner,

v.

CHEVRON CHEMICAL COMPANY, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether an untimely-filed charge of disability discrimination relates back to a timely-filed charge of race and sex discrimination.

2. Whether the equitable tolling doctrine applies to a party represented by counsel who unreasonably claims that he believed he satisfied all administrative prerequisites.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

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6. Pursuant to Rule 29.6, Respondent advises that Chevron Phillips Chemical Company LP, the successor in interest to Chevron Chemical Company LLC, is wholly owned by Chevron Phillips Chemical Company LLC. Chevron Phillips Chemical Company LLC is wholly owned by ChevronTexaco and ConocoPhillips, either directly or indirectly through their wholly-owned subsidiaries. ChevronTexaco's ownership interest is held entirely by Chevron U.S.A. Inc., its wholly-owned subsidiary. ConocoPhillips' ownership interest is held by ConocoPhillips Company, WestTTex 66 Pipeline Company, Phillips Chemical Holdings Company and Phillips Petroleum International Corporation, all wholly-owned subsidiaries of Conoco Phillips.

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RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

Petitioner's Statement of the Case provides an inaccurate recitation of facts and law. Thus, pursuant to Supreme Court Rules 15(2) and 24(1)-(2), Respondent provides this Court with clarifications to Petitioner's Statement of the Case.

As a prefatory matter, the entire basis for Petitioner's request for a writ is his failure to timely file Americans With Disabilities Act ("ADA") charges of discrimination in years 1998 and 2000. Petitioner, however, was no novice at perfecting charges. In this regard, Petitioner filed charges of discrimination in 1990 and 1993. Appendix A. The 1990 charge resulted in a May 1991 lawsuit against Respondent in which Petitioner claimed race discrimination in connection with the denial to him of a promotion. The 1993 charge resulted in a February 1995 lawsuit against Respondent, in which Petitioner claimed that he was denied a promotion due to his alleged disability, "speech," and race, Black.[1] Appendix B. This litigation history of Petitioner certainly emphasizes a degree of expertise when it comes to filing charges and lawsuits of discrimination, including disability discrimination.

In 1998, Petitioner unsuccessfully sought one of two positions at Respondent's Technology Lab in Orange,

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[1] This 1995 lawsuit was dismissed. There is no factual evidence that would establish that the decisionmakers in this lawsuit were aware of any prior lawsuits, and Respondent affirmatively presented evidence that they were not aware of such lawsuits or the basis of such lawsuits. *See, e.g.*, Petitioner's Appendix B-C.

Texas. Specifically, Respondent posted two openings for a Technician 1 (T-1) position in the Molding and the Pipe/PDG Groups. Petitioner (African-American male), an African-American female, and two Caucasian males nominated themselves for the positions by submitting an evaluation form in which they disclosed their specific qualifications for the positions. The evaluation form includes a box entitled "Special Considerations." The purpose of the "Special Considerations" box is unrelated to selections unless those selections are associated with the Company's attempt to "redeploy" an employee selected for layoff, a situation that did not apply to the T-1 positions. Because there existed no layoff at the time of these T-1 decisions, and because the decisionmakers had worked many years with the four self-nominated T-1 candidates, the decisionmakers did not examine the "Special Considerations" box. As such, they did not see or take note of *Petitioner's* typewritten statement in the *Candidate's* Comments section of the box: "Re: Special Considerations (ADA) AMERICAN DISABILITY ACT – STUTTER [sic]."[2] In filling the two T-1 positions, the Respondent utilized its non-discriminatory and non-retaliatory Job Selection

[2] Any implication by Petitioner to this Court that Respondent wrote such a statement on the form is, therefore, misleading and incorrect. Moreover, it is misleading for Petitioner to state that Respondent knew of Petitioner's "stuttering problem" based on a 1977 entry on an initial interview form maintained in his personnel file that stated, "hint of a stuttering problem which he has very well mastered." It is undisputed that the decisionmakers at issue in this case did not review the personnel file, and did not know (despite many years of working with Petitioner) that Petitioner allegedly stuttered or had any speech issues.

Process. Based on the selection criteria and the information provided by each of the four candidates during the interviews, the Selection Team determined that Peggy Williams, an African-American female, and Fred Noyes, a Caucasian male, were best qualified for the T-1 positions.[3] Petitioner learned that he did not obtain a T-1 position on June 16, 1998.

Petitioner filed a charge of race and gender discrimination and retaliation on October 26, 1998, claiming Respondent denied him a T-1 position because of his race (black), gender (male), and in retaliation for filing previous charges of discrimination against Respondent. *See* Petitioner's Appendix E. Petitioner also expressly stated in the charge, "*No black males have ever been promoted to the T-1 position since 1989, when the position was implemented.*" *Id.* (emphasis added). In the EEOC Charge Information Form, and in response to the question "[d]o you believe that you have been discriminated against because of your race, color, national origin, religion, sex, age or disability," Respondent replied, "*Yes*," and further explained: "*Race Sex. I have filed charges with the EEOC twice before. After the first filing, the company settled; After the second filing, I lost. No black males in my dept (area) have been promoted.*" Appendix A (emphasis added).

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[3] Contrary to Petitioner's statement in the Petition at Note 2 that Respondent merely stated that Noyes and Williams were the best-qualified candidates, Respondent, pursuant to the Local Rules of the Eastern District of Texas, attached a Statement of Material Facts with supporting evidence that proved the reasons it believed Noyes and Williams were best-qualified for the jobs.

In its December 14, 1998, statement to the EEOC, Respondent identified the basis for its calculation of Petitioner's score during the selection process – noting that his technical experience in molding and statistics was good, but he lacked skills in the areas of leadership, setting priorities, team work and control charting; while his planning and scheduling skills were adequate, his skills ranked lower than the other candidates; in addition, the Respondent provided the EEOC with documentation of its Job Selection Process, the candidate evaluation matrix completed by the Job Selection Team, the Candidate Evaluation Forms and resumes completed and submitted by all of the candidates, the Personnel Announcement of the decisions, and Respondent's policy on Equal Employment Opportunity. *See* Petitioner's Appendix E. In response, the EEOC issued a Dismissal and Notice of Rights on July 6, 1999. *Id.*

On September 29, 1999, and September 30, 1999, Petitioner's lawyer requested an amendment to the race/sex/retaliation charge of discrimination, seeking to add a charge under the Americans with Disabilities Act ("ADA"). Petitioner's Appendix E. Petitioner's lawyer advised the EEOC in writing that she informed Petitioner of the ADA charge during her first meeting with him on September 27, 1999.[4] *Id.* Petitioner's lawyer also claimed that Respondent's statement to the EEOC in response to his race/sex/retaliation charge – that "Ron's answers to

[4] Given Petitioner's prior charge and lawsuit against Respondent in which he claimed a disability, "speech," and discrimination pertaining thereto, it is unlikely in the extreme that Petitioner failed to recognize all bases for his 1998 charge of discrimination.

some of the interview questions tended to ramble and he repeated himself several times on answers to questions" – indicated a decision based on a potential ADA violation. *Id.* Notwithstanding the untimely request to amend a charge, the EEOC on October 6, 1999, went ahead and vacated the Dismissal of Notice of Rights dated July 6, 1999. *Id.* On November 20, 1999, Petitioner filed a statement with the EEOC expressing his desire "to amend this charge to include being denied promotion because of disability, as defined by, and covered under, the Americans with Disabilities Act." *Id.* Thereafter, the EEOC issued a new Dismissal and Notice of Rights dated November 26, 1999. *Id.* Petitioner filed a lawsuit on February 22, 2000, in the United States District Court for the Eastern District of Texas.

During the course of the litigation, it was announced that Chevron U.S.A. Inc. and Phillips Petroleum Company intended to combine the chemical operations into one company. As a result of this decision, Chevron began reorganizing its workforce, recognizing that one combined company would not require the staffing of two workforces. These efforts to reorganize and streamline operations led to a reduction-in-force. Petitioner was one of many employees selected for layoff.

To diminish the number of employee layoffs, however, Respondent undertook a "redeployment process." This process endeavored to assist employees subject to layoff (i.e., surplus employees) with the identification and placement into any existing and vacant positions within the various Chevron companies. Respondent, therefore, attempted to identify and place several surplus employees, including Petitioner, in several lab openings in its Cedar Bayou, Texas Chemical Plant and its Kingwood, Texas

technology facility. Respondent did not select Petitioner for the Kingwood and Cedar Bayou positions. Respondent informed Petitioner in July 2000 that he did not receive the Kingwood or Cedar Bayou positions.[5]

Petitioner responded to the disappointing news as he always responded: he sought leave in August 2000 to file an amended complaint, claiming that the failure to transfer Petitioner to Cedar Bayou or Kingwood was "additional discrimination and retaliation." Appendix C. On December 22, 2000, Petitioner *again* sought leave to amend the complaint for the purpose of including alleged facts that he claimed to discover following the grant of leave to file his Second Amended Complaint. *Id.* In this newest Request for Leave to amend his Complaint, Petitioner stipulated to the Court that the "Third Amended Complaint *does not assert a new cause of action. . . .* "[6] *Id.* (emphasis added). While Respondent did not file oppositions to such motions,[7]

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[5] The comments referenced by Petitioner in the Petition made by Nethery in his notes (i.e., that Petitioner talked slow and rambled) do not demonstrate that Nethery knew that Petitioner stuttered or that he had a discriminatory animus. Petitioner admitted that the word "rambling" means "mindless chatter." Likewise, that Nethery believed Petitioner spoke slowly in no way translates into "stuttering"; indeed, Nethery testified he heard no stuttering.

[6] Accordingly, based on the Motions for Leave, it appears (contrary to that represented to this Court in Note 5 of Petitioner's Petition), if anything, Petitioner added the discrimination claim in August 2000, and added alleged additional facts to support such claims in December 2000. *See* Appendix C.

[7] At that time, Respondent had no basis to oppose an amendment because it could not show prejudice, futility (i.e., that such claim would not withstand a motion to dismiss), or lack of diligence. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962); *Phelps v. McClellan*, 30 F.3d 658, 662-63) (6th Cir. 1994); *Brunt v. Service Employees Int'l Union*, 284 F.3d 715, 720 (7th Cir. 2002); *Southmark Corp. v. Schulte Roth & Zabel*

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Respondent timely filed answers with the defense that Petitioner's claims were barred, in whole or in part, due to the applicable statute of limitations and/or failure to exhaust or timely exhaust administrative remedies.

In Respondent's Motion for Summary Judgment, it addressed *all* of Petitioner's claims of employment discrimination and retaliation under Title VII and the ADA, including any possible new disability claim.[8] Because 300 days passed without Petitioner filing a charge of discrimination pertaining to the transfer positions, Respondent added a "failure to exhaust administrative remedies" and "statute of limitations" argument when it filed its Reply to the Response to the Motion for Complete Summary Judgment effective June 5, 2001.[9] On June 14, 2001, and September 7, 2001, the Court granted Respondent's Motion for Complete Summary Judgment and dismissed the case with prejudice.

(In re Southmark Corp.), 88 F.3d 311, 315-16 (5th Cir. Tex. 1996). Failure to file a charge is not a jurisdictional issue, but a limitations issue. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Therefore, Respondent properly filed amended answers, inserting therein the defense that Petitioner's claims were barred, in whole or in part, by applicable statute of limitations and/or failure to exhaust or timely exhaust administrative remedies.

[8] Respondent addressed all possible claims out of an abundance of caution, notwithstanding Petitioner's counsel's stipulation on the record in Nethery's deposition and in another witness' depositions in November and December 2000 that Petitioner brought *only retaliation claims* with respect to the 2000 Kingwood and Cedar Bayou lateral transfer positions.

[9] Respondent did not assert this claim earlier because it did not mature until a date following its summary judgment motion filing deadline.

ARGUMENTS AND AUTHORITIES

RESPONDENT'S REASONS FOR DENYING THE WRIT

I. PETITIONER DID NOT ARTICULATE A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

Under Rule 10, a review of a writ of certiorari is not a matter of right, and will be granted subject to this Court's discretion for compelling reasons. Petitioner has not articulated a compelling reason to justify discretionary review by this Court. This case does not present a situation in which a United States court of appeals entered a judgment in conflict with decisions of other United States courts of appeals on an important matter, or an important federal question. With the exception of *one* 1982 Eighth Circuit case, the courts of appeals have been consistent in the decisions concerning when an amendment to an EEOC charge relates back to a timely-filed charge of discrimination. Moreover, there is no dispute when it comes to the application of equitable tolling when a party fails to file or timely file a charge of discrimination with the EEOC. As such, Petitioner presented no compelling reason for this Court to exercise discretionary jurisdiction over the appeal of the United States Fifth Circuit Court of Appeals decision. Indeed, this Court has previously denied a similar Petition for Writ of Certiorari in *Simms v. State of Oklahoma*, 528 U.S. 815 (1999).

II. THE FIFTH CIRCUIT COURT OF APPEALS' DECISION IS CONSISTENT WITH THE APPLICATION OF THE RELATION-BACK DOCTRINE AND DOES NOT VIOLATE STATUTORY OR REGULATORY AUTHORITY.

In a deferral state such as Texas, a plaintiff must exhaust administrative remedies by filing a charge of disability discrimination within 300 days of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); 42 U.S.C. § 12117(a). Failure to file a charge within the 300-day period generally renders the charge untimely and any subsequent claim in a lawsuit is barred by limitations. *See, e.g., Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995); *see also McKenzie v. Lunds, Inc.*, 63 F. Supp. 2d 986, 1000 (D. Minn. 1999).

However, 29 C.F.R. § 1601.12(b) provides that certain amendments to a charge of discrimination may "relate back" to the filing date of the original charge, rendering the amendment timely even when the amendment is filed after the statutory deadline. To "relate back," the amendment must (i) cure technical defects or omissions, including failure to verify the charge,[10] *or* clarify and amplify allegations made therein;[11] *and* (ii) allege additional acts

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[10] In general, a "technical" defect is correcting a name or address or verifying a charge. Alterations to the legal theory, on the other hand, goes to the *substance* of the charge. *See, e.g., Simms v. Oklahoma Ex Rel. Dept. of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 n. 1 (10th Cir. 1999); *see also Hornsby*, 777 F.2d at 247 (noting that addition of a new and independent charge of sexual harassment and new and independent facts to support claim are more substantive than merely to cure technical defects).

[11] An amended charge does not "clarify or amplify allegations" of the original charge where the original charge makes no mention of the

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related to or growing out of the subject matter of the original charge. 29 C.F.R. § 1601.12(b).

The courts of appeal narrowly apply this relation-back doctrine, finding that allegations of *new and independent charges* with *new and independent facts* contained in an amended charge go to the substance of the charge and thus *do not relate back* to the filing of the original charge. *See, e.g., Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962-964 (4th Cir. 1996) (claim of *age* discrimination does not flow from claim of *sex* discrimination); *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247-48 (5th Cir. 1985) (claim of *sexual harassment did not relate back* to charge of *age* and *sex* discrimination);[12] *EEOC v. Mississippi College*, 626 F.2d 477, 483-84 (5th Cir. 1980) (allegations of *racial discrimination* do not relate to or grow out of allegations of *sex discrimination* advanced in original charge and therefore do not relate back); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (relation-back appropriate wherein court characterized the plaintiff's failure to check the "national origin" box on the

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theory or the facts alleged in the amended charge. *See, e.g., Simms*, 165 F.3d at 1326.

[12] The Fifth Circuit Court of Appeals' decision in this case does not conflict with *Sanchez* or *Hornsby*. In this case, Petitioner neither checked the disability box nor alleged facts in the original charge to put the EEOC or Respondent on notice of an allegation of disability discrimination. *See Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 879 (5th Cir. 2003) ("Manning misunderstands the import of our precedent. The issue is not whether the employee *adds* any facts when he amends his charge of discrimination. Instead, the question is whether the employee *already included* sufficient facts in his original complaint to put the employer on notice that the employee may have additional allegations of discrimination.")

Charge form as a "technical defect" after it examined the factual statement contained within the Charge and found it raised national origin); *Fairchild v. Forma Sci.*, 147 F.3d 567 (7th Cir. 1998) (*disability* discrimination charge did not relate back to original *age* discrimination charge, particularly given that no facts to support claim of disability discrimination included in the original charge); *Leong v. Potter*, No. 02-16856, 2003 WL 22439875 *2 (9th Cir. Oct. 29, 2003) (dismissing pleading amendment of disability discrimination claim for failure to satisfy administrative prerequisites: plaintiff's "disability claim relies on a different theory and a different statute than his other claims. Disability discrimination was not investigated by the EEOC, and such an investigation could not have been expected to grow out of [the plaintiff's] charges. Nothing in [plaintiff's] affidavit would have led the EEOC to suspect that he was disabled or had been subjected to disability discrimination."); *Simms v. Oklahoma*, 165 F.3d 1321, 1326-1328 (10th Cir. 1999) (amendment to charge adding retaliation claims, including withholding supervisory duties and failure to promote, did not (i) clarify or amplify allegations in original charges where original charge made no mention of theory or facts alleged in amended charge, or (ii) relate to or grow out of prior charge because it claims a new theory of recovery, retaliation, that were not raised in the prior charge), *cert. denied*, 528 U.S. 815 (1999); *see also Thomas v. Texas Dep't of Crim. Justice*, 220 F.3d 389, 395 (5th Cir. 2000) (charge of gender discrimination did not encompass charge of race discrimination). *But cf. Washington v. Kroger Co.*, 671 F.2d 1072, 1075-1076 (8th Cir. 1982) (allowing relation back of amended charge of race discrimination to original charge of sex discrimination, but substance of second charge was partially asserted in first charge).

As shown above the courts of appeals consistently find that allegations of *new and independent charges* with *new and independent facts* contained in an amended charge go to the substance of the charge and do not relate back to the filing of the original charge. These findings are consistent with the legislative purpose of filing a charge of discrimination: "Prohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period – giving the employer notice and providing opportunity for administrative investigation and conciliation." *Simms*, 165 F.3d at 1327; *see also Fairchild*, 147 F.3d at 575.

Notwithstanding the clear and unequivocal statement of the law governing the relation-back theory, Petitioner argues that the notice requirement is met if (i) the employee lists the date, place and circumstances of the alleged unlawful employment act; and (ii) the employer knows of a potential disability allegation. As a starting point, it is undisputed that neither Respondent nor the EEOC was aware of any alleged disability allegation prior to Petitioner's untimely request to amend.[13] In any event, to accept Petitioner's argument: (i) turns every EEOC

[13] Petitioner claims Respondent knew of such an allegation because it submitted to the EEOC the form that *Petitioner* completed in connection with his request for the T-1 position. Respondent proved, however, during the litigation that the decisionmakers lacked knowledge of *Petitioner's* statement concerning the ADA. Regardless, this form belies Petitioner's assertion that he lacked knowledge of his ADA claim and thus is excused from asserting it timely in a charge. If Petitioner did not know of an alleged disability claim after he attempted to notify Respondent of his alleged stuttering impairment, he cannot expect the EEOC or Respondent to read his race/sex/retaliation charge as one involving disability.

charge, regardless of the content, into a license to inject untimely separate and independent charges against an employer unfettered by the administrative exhaustion requirements of the ADA; and (ii) automatically triggers in every EEOC charge every prohibited category of discrimination, regardless of how detailed and limited the plaintiff's factual allegations are stated. This logic defeats the purpose of the charge of discrimination. *Leong*, 2003 WL 22439875 at *3 ("A decision that an EEOC complaint with no mention whatsoever of disability is 'like or reasonably related to' [plaintiff's] disability claim would reduce the exhaustion requirement to a formality.").

Accordingly, this Court should deny Petitioner's Petition, as it is undisputed that the courts of appeal consistently apply the relation-back doctrine, and Petitioner's *new and independent* charge of disability discrimination in the amended charge of discrimination did not relate back to the filing of the original charge and is time-barred.

III. THE EQUITABLE TOLLING DOCTRINE IS CONSISTENTLY APPLIED, AND IS NOT APPLICABLE IN THIS CASE.

As noted by Petitioner, there is a limited exception for the failure to file a charge of discrimination: A civil complaint may properly encompass any discrimination like or reasonably related to allegations of the EEOC charge and growing out of such allegations. *See, e.g., Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995); *see also Simms*, 165 F.3d at 1327. This "reasonably related" exception includes claims of most retaliatory acts allegedly occurring *subsequent* to the filing of an EEOC charge. *Id.* However, charges are not reasonably related simply because they

assert the same type of discrimination. *Cheek v. Western & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994). Rather, the charges must, at a minimum, describe the same conduct and implicate the same individuals. *Id.* Because this limited exception is generally recognized in retaliation claims arising after a charge is filed, *see, e.g.*, *McKenzie v. Illinois Dept. of Trans.*, 92 F.3d 473 (7th Cir. 1996), Respondent did not claim that Petitioner's new retaliation claim was time-barred.

Petitioner's disability, race and sex discrimination claims with respect to the 2000 lateral positions, however, implicated *different* decisionmakers and *different* discrimination claims, and therefore are not reasonably related. *Cf. Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 984 (10th Cir. 1991) (charge filed with EEOC of discrimination regarding 1986 disciplinary action and 1988 termination did not permit challenge to 1979 nonpromotion); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) (claim of racial harassment not preserved when EEOC charge pertained to earlier time period, only asserted discriminatory failure to promote, and referred to different employees). Accordingly, the discrimination claims relating to the 2000 lateral transfer positions are time-barred absent a showing by Petitioner of equitable tolling or estoppel.

As noted by this Court, the charge filing deadline and requirement is subject to equitable doctrines such as estoppel or tolling. *National R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2072 (2002). "These equitable doctrines allow us to honor Title VII's [and therefore the ADA's] remedial purpose 'without negating the particular purpose of the filing requirement, to give prompt notice to the employer.'" *Id.* at 2076. However, these equitable

doctrines "are to be applied sparingly" and must be proved by the party invoking equitable tolling. *Id.* at 2072; *see also Ramirez v. City of San Antonio*, 312 F.3d 178, 183 (5th Cir. 2002). As acknowledged by this Court in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 112 L.Ed.2d 435, 111 S. Ct. 453 (1990),

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Id. at 457-58 (*citing Burnett v. New York C. R. Co.*, 380 U.S. 424, 85 S. Ct. 1050 (1965) (plaintiff timely filed complaint in wrong court); *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959) (adversary's misrepresentation caused plaintiff's failure to file timely)).

Petitioner's blaming of Respondent for his failure to satisfy the administrative prerequisites lacks merit and is insufficient as a matter of law to satisfy the equitable tolling doctrine. Equitable tolling is appropriate when, despite all due diligence, the plaintiff is able to prove an inability to discover on a timely basis essential information bearing on the existence of his claim. *See, e.g., Pacheco v. Rice*, 966 F.2d 904, 906-907 (5th Cir. 1992); *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 810 n. 14 (5th Cir. 1991). The equitable tolling doctrine operates to stop the limitations clock until the time in which the facts (but not all facts) supporting a cause of action are

or should be apparent. *See Blumberg v. HCA Management Co.*, 848 F.2d 642, 645 (5th Cir. 1988). Petitioner sought leave on August 18, 2000, to amend his lawsuit for the purpose of adding claims concerning the 2000 Kingwood and Cedar Bayou lateral transfer positions, and the court granted leave on August 22, 2000. Accordingly, no later than August 18, 2000, Petitioner knew the facts that he believed supported his claims concerning the 2000 lateral transfer positions by August 18, 2000. Petitioner failed to file a charge of discrimination within 300 days of August 18, 2000, and is therefore barred from asserting an ADA claim.

Likewise, Petitioner's plea of ignorance concerning the statutory preconditions for filing a discrimination lawsuit is contradicted by the record evidence, which reveals his prior litigation against Respondent based on claims of discrimination. To be sure, his own attorney sought to amend his *1998* charge of discrimination to include disability discrimination in an unsuccessful effort to preserve his 1998 disability claim. And notwithstanding his plea of ignorance, a cursory examination of the case law reveals that ignorance alone is not excusable. It is well-settled that discrimination claims that arise after the filing of a charge of discrimination and do not arise out of or relate to the same claims are not viable without the filing of a charge of discrimination – period.[14] Petitioner is deemed to

[14] Any contention that Petitioner's counsel was duped by Respondent's actions in this litigation is absolutely untrue. It is not Respondent's duty to provide legal advice to Petitioner's counsel. In defending the litigation, Respondent complied with the Federal Rules of Civil Procedure: Respondent could not assert that the claim was time-barred until it was time-barred.

have knowledge of this case law, as "[c]onstructive knowledge of a time limit will usually be imputed when the plaintiff retains a lawyer within a limitations period." *Weigel v. Baptist Hosp. of East Tennessee*, 302 F.3d 367, 376 (6th Cir. 2002). Equitable tolling is not appropriate under these circumstances. *See, e.g., Irwin*, 111 S. Ct. at 458 (dismissing petitioner's argument that failure to timely file should be excused because his lawyer was absent from the office when the EEOC notice was served and that he filed within 30 days after he received personal notice, stating "the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect."); *Cruce v. Brazosport Indep. Sch. Dist.*, 703 F.2d 862 (5th Cir. 1983) (claimed ignorance of Title VII procedures negated by representation prior to the filing of the lawsuit).

CONCLUSION

For the reasons stated in this Brief in Opposition to the Petition for a Writ of Certiorari, Respondent, Chevron Chemical Company, LLC, requests that Petitioner's Petition be denied.

Respectfully submitted,

HOLLY H. WILLIAMSON
TARA B. HITTELMAN
AKIN GUMP STRAUSS HAUER & FELD LLP
711 Louisiana, Suite 1900
Houston, Texas 77002
(713) 220-5800 (telephone)
(713) 236-0822 (facsimile)

Attorneys for Respondent Chevron Chemical Company, LLC

APPENDIX A

CHARGE INFORMATION FORM EEOC HOUSTON DISTRICT OFFICE	For EEOC Use Only	
	Intake Officer	0188

Today's Date 10/26/98 Social Security Number 459-90-0415

Name Ronald Howard Manning
(First) (Middle) (Last)

Home Telephone (409) 835-5906
(Include Area Code)

Address 4390 Ector Ave Apt. No.

Work Telephone (409) 882-6836

City Beaumont State TX Zip Code 77705 County Jefferson

Date of Birth 1-16-50 Race African American Sex Male

Provide Information about an individual who does not live with you who would be able to contact you at any time.

Name

Address REDACTED

City

Provide name and address of the company that has allegedly discriminated against you.

Name Chevron Chemical Company

Telephone (409) 727-1471 or 886-7491

Address P.O. Box 7400

City Orange, TX State TX Zip Code 77631-7400

Company head official's name and title Ken Derr; Chairman of the Board CEO

Approximate number of employees 39,000

Your job title Testing Technician

What type of business is this

Oil Refining and Plastics Manufacturing

Does this company have more than one office or location?

Yes ✓ No ____

Do you believe that you have been discriminated against because of your race, color, national origin, religion, sex, age, or disability ? Yes If yes, describe below:

Race, Sex. I have filed charges with the EEOC twice before. After the first filing, the company settled; after the second filing, I lost. No black males in my dept (area) have been promoted.

Have you filed an EEOC charge in the past?

Yes ✓ No ____ (If yes, complete below)

Approximate Date Filed 6/90 & – 12/93

Charge Number (If Known) ____

Company against which you filed your charge Chevron Chemical

Results of your charge?

Settlement first time; I lost the Second time.

I believe I was discriminated against by being (describe how you have been harmed):

Not promoted when a white employee was promoted in line with the way the previous two positions (T1) were filled. A committee procedure was used this time, but not ~~at first~~ the first time. [Illegible] The committee procedure was used sometimes then, I believe.

On what date did you learn that the company took this action against you? 6/16/98

Who caused the harm (Include name, title, race or national origin, sex, age, etc.) Kevin Cable, Shift Supervisor – Techlab, white, male, 33 yrs old & the other selection team

Did a company representative tell you why this action was taken? If yes, what was the reason given for the harm? I was informed of the selections verbally by Porter Shannon, my immediate supervisor

Who informed you of this reason? _____

Were you given any of this information in writing?

Yes ____ No ✓

Why do you believe the harm or action taken against you was discriminatory? Because of my gender; the fact that I've sued before; my race; no black male, in the 21 years plus that I've worked there, has been promoted in my department.

Identify by name, title, race or national origin, sex, age, etc., others who were treated more favorably or better than you in the same or similar situation. Donnie Mires, Harold Hear, and Fred Noyes

Does your employer have an internal grievance procedure or is there a union? Yes ✓ No ____

If yes, did you file an internal grievance and what was the outcome? No, it is new and I have copy of it here

Have you discussed this problem with an attorney or other agency? Yes ✓ No ____ If yes, complete below.

Name and source of assistance _____

Results, if any, I was told to come to the EEOC first

Signature Date

PRIVACY ACT STATEMENT

This form is covered by the Privacy Act of 1974, Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below. 1. **AUTHORITY**, 42 U.S.C. §2000e-5(b), 29 U.S.C. §211, 29 U.S.C. §626. 2. **PRINCIPAL PURPOSE**. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction. 3. **ROUTINE USES**. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints, or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other state, local and federal agencies as may be appropriate or necessary to carry out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation. 4. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION.** The providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is mandatory that this form be used to provide the requested information.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

RONALD MANNING	§	
VS.	§	CIVIL ACTION NO.
	§	1:95CV091
CHEVRON CHEMICAL	§	
COMPANY	§	

ORIGINAL COMPLAINT

(Filed Feb. 21, 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Plaintiff, RONALD MANNING is a resident of the Eastern District of Texas. Defendant, CHEVRON CHEMICAL COMPANY, may be served with process pursuant to the Federal Rule of Civil Procedure, Rule 40 (4)(4) by delivering a copy of the Summons and Complaint to the Defendants Agent for Service of Process, Prentice Hall Corporation System, 400 N. St. Paul Street, Dallas, Texas 75201, by forwarding to Defendant's Agent Registered Mail Return Receipt Request.

II.

Jurisdiction of this court is invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 United States Code Sections 2000e et seq, Title 28 United States Code, Section 1343(3), (8), 2201 and 2202. This action is further brought under the Americans with Disabilities Act of 1990 ("ADA"),

Title 42 United States Code 12101 et seq. This action is also brought pursuant to the Thirteenth Amendment of the United States Constitution to redress the deprivation of rights, privileges, and immunities secured thereby. This action is also brought pursuant to Title 42 United States Constitution Sections 12101 et seq, 2000e et seq, and 1981, to secure the rights of Plaintiff to be free from discrimination in employment on the basis of race, discrimination in employment on the basis of handicap/disability, and to secure Plaintiff's right to make and enforce contracts on the same basis as white citizens.

III.

This is a suit for damages and for injunctive and other affirmative relief against discrimination, which discrimination is violative of the Americans with Disabilities Act, a body of slavery unlawful under the Thirteenth Amendment of the U.S. Constitution, Title 42, United States Code, 12101 et seq, 42 United States codes 2000e et seq. Plaintiff has received his authorization to sue from the Equal Employment Opportunity Commission, and this suit was filed within ninety (90) days of receipt of said authorization to file suit.

IV.

Plaintiff, RONALD MANNING, is a Black, Disabled male citizen of the United States of America, who is a resident of the East District of Texas.

V.

The discriminatory actions violative of the Americans with Disabilities Act, 42 United State Code, Section 12101 et seq, 42 United States Code, Sections 1981, 1983, and 2000e et seq, and the Thirteenth Amendment, alleged herein were all committed within the State of Texas, Eastern District of the United States, Beaumont Division.

VI.

Defendant, CHEVRON CHEMICAL COMPANY, is a corporation operating under the laws of the State of Texas and County of Orange, is qualified to do business in the State of Texas and is doing business in the State of Texas.

VII.

Defendant, is an employer engaged in industry, affecting interstate commerce and employs twenty-five (25) employees, for each working day and each of twenty (20) or more calendar weeks in the current or preceding year.

VIII.

On or about December 1, 1993, Plaintiff was denied promotion to the position of Lab Shift Supervisor after having applied for same. Plaintiff alleges that his denial and/or rejection of the promotion was based upon his Disability, "speech", race, Black and that he was subjected to both Disability and Race based Discrimination during the evaluation procedure instituted by the Defendant in order to be considered for the Promotion. Plaintiff further alleges he was subjected to disparate treatment, the

employment testing resulted in a Disparate Impact upon Plaintiff, and due to such treatment Plaintiff was past over for the promotion. Also, other Caucasian and non-Disabled employees of the Defendant have not been treated in a similar fashion and not held to the same standard. Plaintiff notified persons of higher authority at his employment of the Discriminatory nature of the Defendant's actions. Defendant has failed or refused to take remedial action.

IX.

Plaintiff further believes and alleges that he was subjected to discrimination and disparate treatment for no other reason than his Disability and Race all in violation of Title 42 United States Code, Section 12101 et seq, 2000e et seq, 1981, 1983 and the Thirteenth Amendment of the United States Constitution.

X.

Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs as alleged, and this suit for injunctive relief is his only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from Defendant's Discriminatory practices, procedures, practices, customs, and usages as set forth herein in paragraph VII and VIII until and unless enjoined by this Court.

XI.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, RONALD MANNING, prays this Court advance this case

on this docket, order a speedy hearing at the earliest practicable date, cause this case to be expedited, and on such hearing to this Court, that this Court;

1. Enter a Declaratory Judgment that the practices complained of herein are unlawful and violative of the Americans with Disabilities Act, 42 United States Code, Section, 12101 et seq, Title VII of the Civil Rights Act of 1964, and 42 United State Code, Section 2000e et seq., and 1981;

2. Permanently enjoin Defendant, its agents, assigns, successors, officers, employees, attorneys and those acting in concert with it or them from engaging in each of the unlawful practices, policies, procedures, customs, and usages set forth herein, and from continuing any and all other such practices shown to be in violation of applicable law;

3. Order elimination or modification of practices, procedures, policies, customs, and usages set forth herein and all other such practices shown in violation of applicable law so that they do not discriminate on the basis of race or physical disability;

4. Immediately promote Plaintiff to that job he would now be occupying but for the discriminatory practices of Defendant, and adjust the wage rates, salaries, bonuses, benefits and prerequisites for Plaintiff to that level he would now be enjoying but for the discriminatory practices of Defendant;

5. Award Plaintiff compensation and backpay for such period of time when Plaintiff was denied or past over for promotion until the present;

6. Award monetary damages to Plaintiff to his mental anguish and emotional distress;

7. Award monetary damages to Plaintiff for his intangible losses;

8. Award Plaintiff the costs and disbursements of this action, including reasonable attorney's fees; and

9. Grant each other relief as he may be justly entitled.

RESPECTFULLY SUBMITTED,

/s/ Kent W. Johns
KENT W. JOHNS
1635 Washington Blvd.
Beaumont, Texas 77705
(409) 833-2233
(409) 833-4226 FAX#
TBA# 10675800

ATTORNEY FOR PLAINTIFF

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

RONALD H. MANNING	§	**CIVIL ACTION NO.**
PLAINTIFF	§	**1:00CV-143**
VS.	§	**JURY TRIAL DEMANDED**
CHEVRON CHEMICAL COMPANY, LLC	§	
DEFENDANT.	§	

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED PLEADING

(Filed Aug. 18, 2000)

Comes now, Ronald H. Manning, Plaintiff, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and files his Motion for leave to file an amended pleading and would show:

1. Plaintiff filed his Original Complaint on February 24, 2000. Defendant filed its Original Answer on or about March 24, 2000. Defendant filed its Amended Answer on or about April 3, 2000. Plaintiff requested leave of court to amend his Original Complaint on June 8, 2000. The motion for leave of court was granted and the Plaintiff's First Amended Complaint filed on June 12, 2000.

2. Plaintiff alleges further offenses by Defendant in light of new facts occurring after the first amended complaint which further support the allegations against Defendant

Chevron Chemical Company. Specifically in July 2000, Plaintiff was informed that he would be terminated on September 1, 2000, pursuant to a reduction in force. Since July 2000, Defendant has applied for other lateral transfer positions within the Chevron Chemical Company. Defendant has denied Plaintiff approximately fourteen (14) lateral transfer positions to the other surrounding plants of Defendant. Plaintiff alleges that the failure to transfer him after his termination is additional discrimination and retaliation by Defendant in response to Plaintiff's existing claim.

3. The amendment to the pleading is to expand the breadth of the pleading to include facts occurring after the first amendment of the pleading. The amendment does not assert a new cause of action, and does not alter the nature of the trial.

4. Attached hereto as Exhibit "A" for conditional filing is Plaintiff's Second Amended complaint.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that this Court:

1. Grant his Motion for Leave to File Amended Pleading;

2. Order the Clerk to accept and file Plaintiff's Second Amended Complaint included with this Motion; and

3. Grant Plaintiff any further relief to which he may be entitled.

Respectfully submitted,

/s/ Victoria L. Plante
VICTORIA L. PLANTE
Texas Bar No. 00798436
River Oaks Tower
3730 Kirby, Suite 901
Houston, Texas 77098
Telephone: (713) 526-2615
Facsimile: (713) 520-6853

ATTORNEY-IN-CHARGE FOR
PLAINTIFF RONALD H. MANNING

CERTIFICATE OF SERVICE

I, Victoria L. Plante, hereby certify that a true and correct copy of the foregoing Plaintiff's Motion for Leave to File Amended Pleading has been forwarded on this the 18th day of August, 2000, via hand delivery to:

Holly H. Williamson
Tara B. Hittelman
Littler Mendelson, P.C.
1301 McKinney, Suite 1900
Houston, Texas 77010
ATTORNEYS FOR DEFENDANT

/s/ Victoria L. Plante

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

RONALD H. MANNING	§	**CIVIL ACTION NO.**
PLAINTIFF	§	**1:00CV-143**
VS.	§	**JURY TRIAL DEMANDED**
CHEVRON CHEMICAL COMPANY, LLC	§	
DEFENDANT.	§	

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED PLEADING

Comes now, Ronald H. Manning, Plaintiff, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and files his Motion for Leave to File an Amended pleading and would show:

1. Plaintiff filed his Original Complaint on February 24, 2000. Defendant filed its Original Answer on or about March 24, 2000. Defendant filed its Amended Answer on or about April 3, 2000. Plaintiff requested leave of Court to amend his Original Complaint on June 8, 2000. The motion for leave of court was granted and the Plaintiff's First Amended Complaint filed on June 12, 2000. Plaintiff requested leave of Court to File Plaintiff's Second Amended Complaint on August 18, 2000. The Court granted leave on August 22, 2000.

2. Plaintiff alleges further claims against Defendant in light of new facts discovered during Plaintiff's six (6) depositions of Defendant's employees that were taken after Plaintiff's Second Amended Complaint was filed.

3. The amended to the pleading is to expand the breadth of the pleading to include facts discovered after Plaintiff Second Amended Complaint was filed. Plaintiff's Third Amended Complaint does not assert a new cause of action, and does not alter the nature of the trial.

4. The deadline to request leave of court to file amended pleadings is December 26, 2000.

5. Attached hereto as Exhibit "A" for conditional filing is Plaintiff's Third Amended Complaint.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that this Court:

1. Grant his Motion for Leave to File Amended Pleading;

2. Order the Clerk to accept and file Plaintiff's Third Amended Complaint included with this Motion; and

3. Grant Plaintiff any further relief to which he may be entitled.

Respectfully submitted,

/s/ Victoria L. Plante
VICTORIA L. PLANTE
Texas Bar No. 00798436
River Oaks Tower
3730 Kirby, Suite 901
Houston, Texas 77098
Telephone: (713) 526-2615
Facsimile: (713) 520-6853

ATTORNEY-IN-CHARGE FOR
PLAINTIFF RONALD H. MANNING

CERTIFICATE OF SERVICE

I, Victoria L. Plante, hereby certify that a true and correct copy of the foregoing Plaintiff's Motion for Leave to File Amended Pleading has been forwarded on this the 22nd day of December, 2000, by certified mail, return receipt requested, to:

Holly H. Williamson
Littler Mendelson, P.C.
1301 McKinney, Suite 1900
Houston, Texas 77010

ATTORNEYS FOR DEFENDANT

/s/ Victoria L. Plante